

83728-7

No. 62436-9-I

SUPREME COURT OF THE STATE OF WASHINGTON

KATHLEEN HARDEE,

Petitioner,

v.

THE STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES, DEPARTMENT OF EARLY LEARNING

Respondent.

**AMICUS CURIAE MEMORANDUM IN SUPPORT OF MRS.
HARDEE'S PETITION FOR REVIEW**

Joan K. Mell
III Branches Law, PLLC
1033 Regents Blvd., Suite 101
Fircrest, WA 98466
(253) 566-2510

Counsel for SEIU LOCAL 925 and C.A.R.E.

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BY JONATHAN L. CHAMBERS
JL

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A. IDENTITY OF AMICUS CURIAE APPLICANTS

The Service Employees International Union 925, Early Learning Division (SEIU) and Childcare Advocate Resource and Education (C.A.R.E.) are the amici. The SEIU represents 10,000 licensed and license exempt child care providers throughout Washington State. C.A.R.E. is a for profit network providing support and assistance to child care providers in Washington State.

B. COURT OF APPEALS DECISION

This memorandum is filed in support of Mrs. Hardee's Petition for Review of the Court of Appeals decision from Division I No. 62436-9-1.

C. ISSUES PRESENTED FOR REVIEW

Whether the application of a preponderance standard of proof to the revocation of a child care provider's license warrants Supreme Court review under RAP 13.4(b)?

D. STATEMENT OF THE CASE

The Court of Appeals decided Mrs. Hardee's child care license may be revoked by a preponderance evidence standard. The court characterizes Mrs. Hardee's license as a "site license", obtainable by meeting twenty hours of required training. Op. 7. The court further describes the character of the license as an occupational, rather than professional license. Op. 8. While the court distinguishes a child care license based upon two criteria from the statutory definition of

“professional license”, the court omits any reference to common characteristics. Specifically, the authority of a state agency to revoke a license based upon character measures such as “unprofessional conduct.” RCW 18.130.180. Mrs. Hardee was held to a professional standard that requires child care providers demonstrate “necessary characteristics.” WAC 170-296-0140(2)(a), (f) and Op. 15.

The court does not rely upon the fact that a state issued Department of Early Learning license is required to provide child care services. RCW 43.215.010(1) and RCW 43.215.250. A person who provides child care without a license faces misdemeanor criminal penalties. RCW 43.215.340. A child care provider may also be scrutinized under the child abuse and neglect standards of Child Protective Services at the Department of Social and Health Services and law enforcement. RCW 26.44.030 (1)(a) and Notes: Legislative Findings -- 1985 c 259. Child care providers face strict background check requirements. RCW 43.215.200(3) and RCW 43.215.215.

A unique characteristic of child care providers in this State is their special status as public employees for purposes of collective bargaining. RCW 41.56.028. For the most part, these public employees are women.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

In addition to agreeing with the conflict of law analysis by Mrs. Hardee in her petition for review, the amici assert the Court of Appeals decision to deny Mrs. Hardee a clear and convincing evidence standard

should be reviewed under RAP 13.4(b)(3) and (4). The decision raises a significant question of due process under state and federal constitutions. A constitutional due process question provides an appropriate reason for review under RAP 13.4(b)(3). *Kustra v. Dept. of Labor and Industries*, 165 Wn.2d 1001, 198 P.3d 511 (2008). The employability of child care providers and the disparate impact on the employability of women are of substantial interest to the public. A substantial public interest provides an appropriate reason for review under RAP 13.4(b)(4). *Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 214, 193 P.3d 128 (2008), *State v. Watson*, 155 Wn.2d 574, 122 P.3d 903 (2005).

1. The Profound Negative Implications from a State Determination that A Person Lacks The Requisite Character To Hold A Required State Credential Necessitates a Heightened Due Process Standard

The evidentiary standard of proof is a procedural due process protection under the federal and state constitution. *Mansour v. King County*, 131 Wn. App. 255, 264, 128 P.3d 1241 (2006). The standard of proof is a "mandatory safeguard." *Id.* This safeguard instructs the fact finder on the degree of confidence society thinks the fact finder should have in the correctness of the factual conclusion. *Id.* The standard shifts the risk of an erroneous conclusion between parties. *Id.* The question asked of the fact finder indicates the appropriate standard. *Id.* If the question asked is of high importance to the affected party, then too the standard is higher. *Id.*

A clear and convincing standard is an intermediate standard. *Id.*

This intermediate standard applies to certain civil matters where the interest protected is more than a mere monetary judgment. *Id.* Proceedings where the interests of the affected party require an intermediate standard of proof include involuntary commitment, fraud, quasi-criminal wrongdoing, termination of the child parent relationship, suspension or revocation of a teaching certificate, and situations where the affected party's reputation would be tarnished. *Id.* and WAC 181-86-170. Common to each of these proceedings is a decision that is long lasting or negatively reflects on the character of an individual. Thus, a child may be temporarily removed from the home based upon preponderance standard; however permanent termination of the parent child relationship requires clear and convincing proof. *Id.* For educators, both a temporary suspension and revocation proceeding requires clear and convincing evidence. WAC 181-86-170.

Here the Court of Appeals focused on the character of the license, rather than the duration of the decision or the character judgment of the person. To support its decision, the court held a child care license is a "site" license or an "occupational" license, citing *Brunson v. Pierce County*, 149 Wn. App. 855, 205 P.3d 963 (2009)(Preponderance standard to temporarily suspend an erotic dancer's local county issued license) and distinguishing *Ongom v. State, Dep't of Health, Office of Prof'l Standards*, 159 Wn.2d 132, 104 P.3d 1029 (2006)(Clear and convincing standard to suspend state issued nursing assistant's license) and *Nguyen v. State, Dep't*

of Health Med. Quality Assurance Comm'n, 144 Wn.2d 516, 29 P.3d 689 (2001)(Clear and convincing standard to revoke state issued medical license for five years). These cases do not support the proposition that the criteria for establishing the burden of proof is whether the credential is a professional or site credential. Instead, these cases indicate the proper criteria evaluate the impact of the decision on the licensee. Consistent with these cases, a child care license permanently revoked on grounds that substantially disparage the reputation of the licensee deserves higher due process protection than a preponderance standard.

The *Brunson* case is not at odds with a rationale for heightened due process when the decision is permanent and disparaging. The erotic dancers in *Bruson* were facing a temporary suspension of a local regulatory requirement. Losing the ability temporarily to make money in King County as an erotic dancer does not have the same negative implications as a determination that a child care provider is not fit to care for children ever in any jurisdiction.

The *Ongom* and *Ngyuen* decisions are similarly consistent with a rationale that focuses on the individual provider. In *Nguyen*, this rationale is well articulated: "a professional disciplinary proceeding subjects a doctor to grave concerns which include the potential loss of patients, diminished reputation, and professional dishonor." In *Ongom*, the court indicated the professional character of the license was not determinative because a nursing assistant credential is equally valuable to the nursing

assistant as is the medical credential of a medical doctor. So too, Mrs. Hardee's child care license is equally valuable to her.

Similar to health care providers and teachers, child care providers are subject to state scrutiny of their character. Health care providers may lose their requisite state credential if they engage in unprofessional conduct. RCW 18.130.180. Teachers may lose their certificate if they engage in unprofessional conduct. RCW 28A.410.210 and WAC 181-87. Both credentials have clear and convincing standards. Child care providers may lose their requisite state credential if they lack the necessary characteristics of a child care provider. RCW 43.215.205 and WAC 170-296-0140.

The Department of Early Learning requires a child care provider be truthful, reliable, dependable, and ethical with clients, staff, the department and the community. WAC 170-296-0140. A child care provider must have the physical ability to respond immediately to the health, safety and emotional well being of a child. Id. A child care provider must have a disposition that is respectful of a child's need for caring attention from a caregiver. Id. A child care provider must understand how children develop socially, emotionally, physically, and intellectually. Id. A characteristic that even parents sometimes feel they lack. And finally, a child care provider must have the ability to plan and provide care for children that is based on an understanding of each child's interests, life experiences, strengths, and needs. Id. Apparently, these

criteria enable the Department to fulfill its statutory purpose of promoting the hiring of suitable child care providers. RCW 43.215.005.

If, at any time, a child care provider does not demonstrate these characteristics, the provider's license may be revoked. RCW 43.215.205 and RCW 43.215.300. In the event of an adverse action, the Department is obligated to notify public and private child care resources and referral agencies of the adverse action. RCW 43.215.300. At this point, the child care provider suffers tremendous harm to her reputation. This harm is not limited to her ability to work as a child care provider. An adverse action at the Department of Early Learning may disqualify the person from both public and private employment. RCW 43.20A.710 and RCW 18.130. The impact will likely extend beyond this state. A state determination that a person lacks the requisite character to work with children is far reaching. This information is readily available over the internet and via public disclosure. RCW 43.215.370 and RCW 42.56. Other states look at this state's standards when issuing credentials. Out of state employers rely upon this state's information to make employment decisions. A person lacking in character by State standards will not be well received.

Child care providers like teachers provide services that are as a matter of public policy valuable to the well being of our communities. *Lines v. Yakima Public School, Yakima School Dist. No. 7*, 12 Wn. App. 939, 533 P.2d 140 (1975). The Legislature believed so strongly in the importance of early childhood care that it created the Department of Early

Learning to “safeguard and promote the health, safety, and well being of children receiving child care.” RCW 43.215.005. The impact of revocation decision on grounds that disparage the character of the individual service provider implicates a higher due process standard because the decision seriously impairs the employment of the service provider. *Id* at 944. Abuse and neglect of a child is a criminal offense as well as a quasi-criminal offense under the division of child protective services. RCW 9A.16.100 and RCW 26.44. While Mrs. Hardee was not accused or found to have abused or neglected a child, she was judged under a standard that suggests wrongdoing to a child. Mistreatment of a child is fairly considered a particularly reprehensible act. Thus, the implications of the decision on Mrs. Hardee’s employability are profound. Mrs. Hardee deserves the heightened due process protections of a clear and convincing standard.

2. The State Has A Substantial Interest In Protecting Equal Employment Rights For Women

The Legislature found child care of significant public interest that it granted child care providers special status under the law for purposes of collective bargaining. RCW 41.56.028. Local 925 is a Local of the Service Employees International Union representing the interests of approximately ten thousand licensed and licensed exempt child care providers in this state. Of those ten thousand, the majority are women. The Bureau of Labor Statistics reports 95.6 percent of child care workers are women. www.bls.gov/cps/demographics.htm#women.

C.A.R.E.'s clientele are women. The court of appeals denigrates these women by equating the work they do to the work of an erotic dancer.

This court should be concerned with any judicial trend that has a disparate impact on women. Equality of rights and responsibility under the law shall not be denied or abridged on account of sex. Wash. Const. art. XXXI § 1. Equal employment is well-recognized state and federal policy. 29 U.S.C.A. § 206(d) and RCW 49.60.180. The court of appeals decision in *Hardee* in reliance upon the *Brunson* decision suggests a judicial trend to apply a lesser due process standard to women. Such a trend has unfavorable gender as well as class implications.

While erotic dancers did not receive a heightened due process standard in *Brunson*, the male business owner of an adult entertainment license was entitled to heightened procedural safeguards before his license could be suspended. *JJR, Inc. v. City of Seattle*, 126 Wn.2d 1, 891 P.2d 720 (1995)(Adult entertainment license revocation may be stayed pending judicial review to protect freedom of expression). Criteria that have a disparate impact on a protected class of individuals may violate civil rights. *Fahn v. Cowlitz County*, 93 Wn.2d 368, 610 P.2d 857 (1980)(Height requirements have a disproportionately unfavorable impact on certain classes, particularly women and minorities, and is therefore an unfair employment practice.)

Here, the application of a lesser due process standard for child care providers has a disproportionate impact on the employability of women

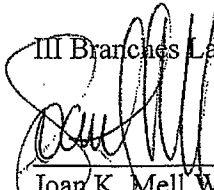
because more than ninety percent of child care providers are women. Traditionally male trades, such as a contractor, are not subjected to the rigorous personal character criteria applied to child care providers. RCW 18.27. The criteria for determining the applicable due process standard should emphasize the impact of the decision on the employability of the provider in his or her chosen profession. Use of criteria that denigrates women or that disparately impacts the jobs available to women violates the principles of equal employment. The Court of Appeals decision should be reversed. Child care providers should receive the due process protection of a clear and convincing standard of proof.

F. CONCLUSION

A child care licensee should receive the same constitutional due process applicable to health care providers and teachers. The applicable evidentiary standard should be clear and convincing in a revocation proceeding because the credential is required and revocation of the credential is far reaching and damaging to the character of the individual. The Supreme Court should accept review and reverse the decision of the Court of Appeals, to apply a clear and convincing evidence standard to the child care profession.

RESPECTFULLY SUBMITTED this 1st day of December, 2009.

III Branches Law, PLLC


Joan K. Mell WSBA # 21319
Attorney for Amicus Applicants

CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the forgoing Amicus Curiae Memorandum in Support of Mrs. Hardee's Petition for Review on all parties or their counsel of recorded by U.S. Postal Service postage prepaid on the date below as follows:

Philip A. Talmadge
Sidney Charlotte Tribe
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630

Carol Farr
The Law Office of Leonard W. Moen and Associates
947 Powell Ave. SW, Ste. 105
Renton, WA 98057-2975

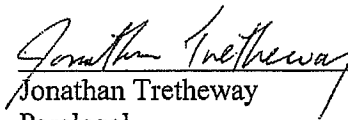
Patricia Allen
WA State Attorney General
800 5th Ave., Ste. 2000
Seattle, WA 98104-3188

Jay Geck
Office of the Attorney General
PO Box 40100
Olympia, WA 98504-0100

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Date this 1st Day of December 2009 at Fircrest, Washington.


Jonathan Tretheway
Paralegal
III Branches Law, PLLC

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Dear Clerk of the Court,

Attached please find the Motion to File Amicus Curiae Brief and Amicus Curiae Memorandum in Support of Mrs. Hardee's Petition for Review in the matter of Kathleen Hardee v. The State of Washington, Department of Social and Health Services, Department of Early Learning, Case Number 62436-9-I. These documents are submitted by Attorney Joan K. Mell, WSBA # 21319, Ph. 253-566-2510, E-mail joan@3brancheslaw.com

Sincerely,

Jonathan S. Tretheway
Paralegal to Joan K. Mell
III BRANCHES LAW, PLLC
1033 Regents Blvd. Ste. 101
Fircrest, WA 98466
253-566-2510 ph
281-664-4643 fx
jonathan@3brancheslaw.com